SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

NO. 73-1895

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

STATE OF TEXAS, STATE OF MISSOURI, STATE OF WISCONSIN, STATE OF OKLAHOMA, and STATE OF KANSAS, Petitioners

v.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

Opinions below 2

Jurisdiction 2

Question presented 2

Statute involved 2

Statement 4

Reasons for granting the writ 9

Prayer 12

CITATIONS

Cases:

Brown v. Board of Education of Topeka, 344 U.S. 1 (1952) 10

State of Texas v. Train, No. A 74 CA 004 (W.D. Tex., filed Jan. 14, 1974) 8

Taylor v. McElroy, 360 U.S. 709 (1959) 10

Train v. Campaign Clean Water, (Sup. Ct. No. 73-1378) 2, 9, 10, 11

Train v. City of New York, (Sup. Ct. No. 73-1377) 2, 9, 10, 11

Turner v. City of Memphis, 369 U.S. 350 (1962) 10

Statute:

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. 1281, *et seq.* (1973 Supp.) 2, 3, 4

Section 205(a) 2, 8

Section 205(b) 3

Section 207 ..... 2, 8

Book:

C. Wright, Federal Courts § 106 (1970) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. ____

STATE OF TEXAS, STATE OF MISSOURI, STATE OF WISCONSIN, STATE OF OKLAHOMA, and STATE OF KANSAS, Petitioners

v.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The States of Texas, Missouri, Wisconsin, Oklahoma and Kansas petition for a writ of certiorari to review the decision of the United States District Court for the Western District of Texas. Said decision has been appealed by the Respondent Administrator to the United States Court of Appeals for the Fifth Circuit and is now pending on the docket of that court. Written briefs and oral argument have been presented to the court of appeals, but that court has decided to withhold judgment on the merits pending this Court's decision in *Train v.*

City of New York (No. 73-1377) and *Train v. Campaign Clean Water* (No. 73-1378), certiorari granted April 29, 1974.

OPINIONS BELOW

The opinion of the district court (App. A) was entered on October 2, 1973, and is unreported. The court of appeals has not rendered judgment in this case.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Administrator, acting under the direction of the President, has discretion under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 to allot to the States under Section 205(a) less than the full amounts authorized by Section 207.

STATUTES INVOLVED

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. 1281, *et seq.* (1973 Supp.) provide:

> Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the

Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

(b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment

of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

In October 1972, after more than two years of deliberation, Congress overwhelmingly passed a far-reaching water pollution control bill which had as its objective the restoration of the nation's waters to their natural state.[1] The heart of this ambitious undertaking was the commitment of vast amounts of federal funds to state and local governments to assist in the construction of sewage treatment plants. The Administration had opposed the bill because of the large sums of federal spending called for and because of the funding mechanism employed in the bill to ensure the availability of these sums. Consistent with that position, the President vetoed the bill, citing its inflationary nature.

[1] The bill, S.2770, 92d Cong., 2d Sess., was enacted as the Federal Water Pollution Control Act of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.* (Supp. 1973) (hereinafter referred to as the "Act").

When the vetoed bill was returned to the Congress, the principal spokesmen for the bill in both houses, while acknowledging the magnitude of the federal spending called for, reiterated the vital importance of cleansing this country's lakes and streams; the veto was overridden by decisive margins.

A month later, the President ordered the Administrator of the Environmental Protection Agency[2] to allot to the States only $5 billion of the $11 billion authorized by Congress for the first two fiscal years of the program's operation, thus seeking to accomplish by the controversial practice of impoundment[3] what he had failed to achieve in exercising his constitutional veto power.

The dramatic difference between the sums Petitioners received under the reduced allotment ordered by the President and the sums they would have received had full allotment been permitted is demonstrated in the following tables.

[2] Hereinafter referred to as the "Administrator". At the time the actions complained of herein took place and at the time this action was commenced, the Administrator was William D. Ruckelshaus. The present Administrator is Russell E. Train, the Respondent herein.

[3] As used herein, the term "impoundment" means any action of the Executive that prevents the allotment, obligation, or expenditure of funds authorized or appropriated by Congress.

Table 1: Full Allotments & Reduced Allotments for Fiscal Years 1973 and 1974

States' Percentage Share	FULL ALLOTMENT $5 Billion 1973	FULL ALLOTMENT $6 Billion 1974	REDUCED ALLOTMENT $2 Billion 1973	REDUCED ALLOTMENT $3 Billion 1974
Texas 2.7694%	$138,470,000	$165,744,000	$55,388,000	$83,082,000
Wisconsin 1.7415%	$ 87,075,000	$104,490,000	$34,830,000	$52,245,000
Missouri 1.6556%	$ 82,780,000	$ 99,336,000	$33,112,000	$49,668,000
Oklahoma .4608%	$ 23,040,000	$ 27,648,000	$ 9,216,000	$13,824,000
Kansas .3742%	$ 18,710,000	$ 22,452,000	$ 7,484,000	$11,226,000

Table 2: Summary of Total Allotments & Effect on States for Fiscal Years 1973 and 1974.

State	Total Reduced Allotment 1973 & 1974	Total Full Allotment 1973 & 1974	TOTAL AMOUNT WITHHELD
Texas	$138,470,000	$304,214,000	$165,744,000
Wisconsin	$ 87,075,000	$191,565,000	$104,490,000
Missouri	$ 82,780,000	$182,116,000	$ 99,336,000
Oklahoma	$ 23,040,000	$ 50,688,000	$ 27,648,000
Kansas	$ 18,710,000	$ 41,162,000	$ 22,452,000

As can be seen rather readily, the practical effect of the Administrator's action was to give to the States for fiscal years 1973 *and* 1974 what they should have re-

ceived for 1973 *alone*. In short, the States were effectively denied their fiscal 1974 allotment.

Petitioner State of Texas, joined by Petitioners Wisconsin, Missouri, Oklahoma and Kansas, filed suit in the United States District Court for the Western District of Texas, Austin Division, seeking judgment that the Administrator's $2 billion and $3 billion allotment for fiscal years 1973 and 1974 violated the Act, and an order compelling the Administrator to allot the full $5 billion and $6 billion authorized by the Act for those years.

Petitioners moved for summary judgment and the Administrator moved to dismiss, relying on the doctrines of "ripeness", sovereign immunity, and political question, and on the ground that Petitioners had failed to state a claim upon which relief could be granted.

On October 2, 1973, the district court entered its Memorandum and Order. In a thorough discussion of the issues, the court first disposed of the preliminary defenses raised by the Administrator, holding that the case was clearly ripe for judicial determination,[4] and that the doctrines of sovereign immunity and political question were inapplicable.[5] After careful analysis of the merits, the court declared that ". . . in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act,

[4] App. A at 18-19.

[5] App. A at 19-21.

this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in § 207 of the Act in accordance with § 205(a)".[6]

Accordingly, judgments were entered as to each of the Plaintiff States[7] which (a) denied the Administrator's motion to dismiss; (b) granted Plaintiffs' motion for summary judgment; (c) declared the $2 billion and $3 billion allotments unlawful under the Act; and (d) ordered the Administrator to allot to each of the Plaintiffs its share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.[8]

The Administrator appealed to the United States Court of Appeals for the Fifth Circuit and the case was docketed in that Court on January 9, 1974. On motion of the Administrator, the court of appeals granted a stay of the district court's order on January 28, 1974. Subsequently, briefs were submitted by the parties and oral argument was held before a panel of the court of appeals on April 29, 1974, the date upon which this Court

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[6] App. A at 24.

[7] Texas (App. B); Oklahoma (App. C); Wisconsin (App. D); Missouri (App. E); Kansas (App. F).

[8] Practically before the ink was dry on the district court's order disallowing the impoundment of 1973 and 1974 funds, the Administrator, on January 10, 1974, impounded $3 billion of the $7 billion authorized by the Act for fiscal year 1975. Texas has filed suit challenging this action. *State of Texas v. Train*, No. A 74 CA 004 (W.D. Tex., filed Jan. 14, 1974).

granted petitions for writ of certiorari in *Train v. City of New York* (73-1377) and *Train v. Campaign Clean Water* (73-1378).

During oral argument, the court of appeals indicated that it would stay the rendition of final judgment in the instant case until this Court rules in the *City of New York* and *Campaign Clean Water* cases. After oral argument, Petitioners moved for expedited judgment on the merits and to vacate the stay of the district court's order. On May 21, 1974, the court of appeals denied the motion for expedited judgment, but granted, effective June 5, 1974, the motion to vacate the stay. (App. G).[9] On May 28, 1974, the court of appeals informed counsel that ". . . the disposition of [the instant case] is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York,* (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974." (App. H)

REASONS FOR GRANTING THE WRIT

1. The issues in this case are essentially the same as those raised in the petitions for certiorari in *Train v.*

[9] The court of appeals had expressed concern during oral argument over the issue of whether the Administrator is authorized by the Act to allot at a later time the funds he is presently withholding. Specifically, the court's concern was that if it continued its stay of the district court's order and the Act did not authorize such later allotments, then the $3 billion the Administrator has refused to allot for fiscal year 1973 will be lost irretrievably at the close of the initial statutory period of availability, *i.e.*, June 30, 1974. Respondent has sought a renewal of the stay from this Court. (A-11-75) For the reasons stated in Petitioners response to that application for stay, Petitioners unequivocally oppose a further stay of the district court's order.

City of New York and *Train v. Campaign Clean Water.* In *City of New York,* the Administrator challenges the District of Columbia Circuit's holdings that the Act requires allotment of full amounts authorized by Congress to be appropriated, and that the case is not barred by the doctrine of sovereign immunity. In *Campaign Clean Water,* the Administrator raises, in addition to the sovereign immunity issue, the question of whether the Administrator's impoundment action is subject to judicial review. Similarly, in the instant case, the Administrator raised the sovereign immunity and "justiciability" issues in the district court; and in the court of appeals, the Administrator, while dropping the sovereign immunity argument, still insists that the case is not subject to judicial review. Under these circumstances, granting of certiorari prior to the judgment of the court of appeals would be entirely consistent with the past practice of this Court. See, e.g., *Turner v. City of Memphis,* 369 U.S. 350 (1962); *Taylor v. McElroy,* 360 U.S. 709 (1959); *Brown v. Board of Education of Topeka,* 344 U.S. 1 (1952); C. Wright, Federal Courts § 106, pp. 477-78 (1970).

2. Further, this case involves a question of "imperative public importance" within the meaning of Rule 20 of this Court. Respondent, at the insistence of the President, has, by the action complained of here, eviscerated the Act, frustrated the will of Congress, and perpetuated the defilement of the nation's waters by raw or inadequately treated municipal waste. And the legality of this sweeping action cannot be determined in a court

of law, Respondent contends, because such conduct by the Executive Branch is not governed by legally definable standards. The manifest importance of these issues to the public and to this nation's constitutional fabric does not require lengthy explanation.

3. Granting a writ of certiorari in the instant case would allow it to be joined with the *City of New York* and *Campaign Clean Water* cases for this Court's consideration. This, in turn, would greatly serve the interests of judicial economy, since the rights of the Petitioners could be finally resolved before this Court without the need for further proceedings in the court of appeals.

4. Moreover, the record in the instant case contains evidence on the impact of the Administrator's impoundment action on the States,[10] the political entities to which the duty of allotment is actually owed under the Act. This factual record would be of assistance to the Court in judging the important legal issues raised in this controversy.

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[10] Petitioners Texas, Wisconsin, and Missouri submitted sworn affidavits in support of their motions for summary judgment that showed that their waste treatment construction needs far exceed the paltry allotment made to them for fiscal years 1973 and 1974; that because of the reduced allotment presently identified, waste treatment projects will not receive the Administrator's consideration; and that the result is delay and postponement of needed pollution control facilities, continued deterioration of the States' waters, and a clear probability that the goals of the Act will not be achieved. These affidavits, undisputed by the Administrator, are reproduced in the printed appendix in the court of appeals at 23-35 (Texas); 61-70 (Wisconsin); and 86-89 (Missouri).

5. Finally, granting of certiorari would allow Petitioners to appear as parties before this Court and to secure, should the Court rule against the Administrator, a final and binding judgment enforceable against the Administrator. Otherwise, even if this Court should so rule, Petitioners face additional proceedings in the court of appeals and the possibility of an appeal to this Court, with the unnecessary cost and delay attendant thereto.

PRAYER

For the foregoing reasons, Petitioners respectfully pray that their petition for writ of certiorari be granted and that any further stay of the district court's order be denied.

Respectfully submitted,

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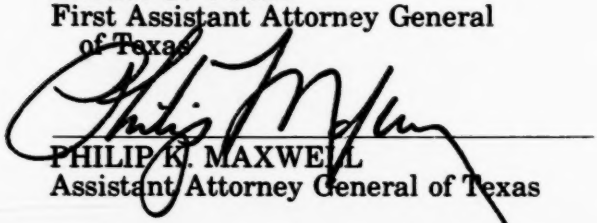
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General
of Texas



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APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL.,	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
ROBERT W. FRI,	)(	
Acting Administrator of	)(	[Filed Oct. 2, 1973]
the United States	)(	
Environmental Protection	)(	
agency	)(	

MEMORANDUM OPINION AND ORDER

This is an action for declaratory judgment and mandamus to compel Defendant to allot the entire sum of money appropriated by Congress in the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816 (hereinafter the "Act"), to be spent for the construction of waste treatment plants for fiscal years 1973 and 1974. The State of Texas, which has been joined by the States of Oklahoma, Missouri, and Wisconsin, as intervenors, has brought this suit as a class action for all the States entitled to the allotment of said funds.

The facts, which are not in dispute, are as follows. On October 4, 1972 the Congress passed a water pollution control bill authorizing appropriation in the amount of $11,000,000,000. for the fiscal years 1973 and 1974. The

bill was vetoed on October 17, 1972 by the President, who stated that he found the bill to be inflationary. The Congress subsequently overrode that veto. On November 28, 1972 the Administrator of the Environmental Protection Agency (hereinafter E.P.A.) announced that pursuant to the President's directive he was allotting only $5 billion of the total $11 billion authorized. It is this "impoundment of funds" which is challenged in this suit.

The Court will deal first with the Defendant's motion to dismiss before proceeding to the merits. Defendant contends that this Court should dismiss this action because (1) Plaintiffs have failed to present a justiciable question; (2) this suit is essentially a suit against the sovereign and hence barred by sovereign immunity; and (3) this suit presents a political question which this Court cannot decide.

Defendant argues that since the complaint is barren of any allegation that any eligible applicant State has yet been turned down on any plan or project due to lack of funds, this suit is a hypothetical one and is not a case or controversy. This contention fails for three reasons.

First, the State of Texas has sworn through the affidavit of its Executive Director of the Texas Water Quality Board that the Board has approved and submitted plans to the E.P.A. 101 grant applications totalling $146,823,228. This amount exceeds the reduced total federal allotment of $55,388,000. made to the State of Texas in fiscal year 1973. Thirty-four of these applica-

tions have been turned down by the E.P.A. for lack of priority. At least sixty-three additional applications for federal aid are in the offing. It is thus clear that the State of Texas' interest in its reduced funding is more than hypothetical.

Secondly, it is clear from the legislative history that Congress was concerned with the ability of the grantees to effect long range plans in combating pollution. Indeed the planning problem was the reason for the implementation of the allotment procedure rather than the normal appropriation procedure in the Act. Congressman Harsha, the floor manager of the Act, observed during the debate on an amendment to substitute the normal appropriation procedure for the allotment procedure, "it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long range planning." 118 Cong. Rec. H2727 (Daily ed. March 29, 1972). It is clear that by the impounding of funds, the Administrator has placed a cloud over the long range planning ability of State and local governments.

Thirdly, Plaintiffs are injured because the funds authorized to be distributed to the States will be lost if not allotted at the appropriate time by the Administrator. In accordance with § 205(b)(1) only those funds properly allotted will remain available for obligation after the fiscal year for which they were appropriated.

The second ground for dismissal offered by the Defendant is sovereign immunity. A suit is said to be one

against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or to compel it to act. *Land v. Dollar,* 330 U.S. 731, 738 (1941). Defendant claims that a judgment in this suit would expend itself on the public treasury. This very contention was rejected in a case in which the Defendant raised the doctrine of sovereign immunity as a bar to the very claim sought to be litigated here. The court noted that the relief would not cause the *expenditure* of any unappropriated funds but only the *allotment* to the States of such funds. *New York City, et al. v. Ruckelshaus,* Civil No. 2466-72 (D.D.C. May 8, 1973). While these funds would become available for obligation, they would not thereby become obligated until Defendant approves a specific grant. Moreover, even if disbursement of the funds were sought, it is well established that such suits are not against the sovereign if there is a mandatory duty, which is alleged by the Plaintiffs in this case, to spend the funds. *Udall v. Wisconsin, Colorado, and Minnesota,* 306 F. 2d 790, 792 (D.C. Cir. 1962).

Defendant's third basis for dismissal is that Plaintiffs have called upon this Court to decide a "political question". Defendant paints the issue here with too broad a brush. The Court perceives the issue not to be the power of the executive in spending vis a vis the Congress but to be whether Congress intended that the funds in question must be allotted to the States or whether the Act

gives the Administrator discretion in allotting the funds to the States. The judicial branch has the function of requiring the executive branch to stay within the limits prescribed by the legislative branch. *National Automatic Laundry v. Shultz,* 443 F. 2d 689, 695 (D.C. Cir. 1971).

Now that it is established that this Court is not barred from considering this case, it is appropriate to proceed to the merits. The proper starting point is § 205 of the Act, which provides that:

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all the States.

Public Law 92-500, § 205(a).

It is significant to note that the word shall, which is used repeatedly, is normally mandatory in nature. *Boyden v. Commissioner of Patents,* 441 F.2d 1041 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 842 (1971). Furthermore the procedure set up appears to give the Administrator no discretion in the actual allotting of funds. The

amount is established by a formula, and any amount allotted but not obligated must be reallotted in accordance with § 205(b)(1).

Defendant contends that allotment is discretionary on the basis of certain amendments made to §§ 205(a) and 207 of the Act. In § 205(a) the word "all" was deleted before "Sums authorized to be appropriated" and in § 207 the phrase "not to exceed" was inserted before the sums specified in the section. To evaluate these changes in the wording of the Act, it is appropriate to examine the views of the sponsors of the Act. See *Bank of Logan, Utah, v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Congressional Record reveals that the amendments to §§ 205(a) and 207 were proposed by Congressman Harsha, the floor manager of the bill, to point out that the Administrator was to have discretion regarding the obligation and expenditure of funds authorized under the Act. In explaining his amendments, Congressman Harsha said, "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205 (a) and insertion of the phrase 'not to exceed' in section 207 was intended to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. at H9122 (Daily ed. Oct. 4, 1972). Senator Muskie, the sponsor of the Act in the Senate, stated that the sole intent and purpose of the amendments was to give the Administrator some flexibility concerning the obligation of the sums specified in § 207.

118 Cong. Rec. at S1854 (Daily ed. Oct. 17, 1972). Senator Muskie emphasized the same point when he said that the full $18 billion authorized by the Act would probably not be spent until the end of fiscal year 1979. 118 Cong. Rec. at S18547 (Daily ed. Oct. 17, 1972).

The reason for the distinction between allotting and spending becomes evident when placed in context of the congressional concern over the problems of planning. As noted earlier Congress chose the allotment procedure and contract authority so that state and local governments would be able to effectively make long range plans in their fight against water pollution. The feeling was that without unequivocal federal financial commitment state and local governments would have difficulty entering into long term contracts and financing long term bonds. It is illogical to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments. The logical interpretation seems to be that Congress intended to make a definite financial commitment to the state and local governments while at the same time giving the Administrator some discretion in the rate of spending to ease inflationary pressures.

In dealing with the language of a statute the Fifth Circuit has said, "We must look as well to the logic of

Congress and the broad national policy which was evidenced by its enactment." *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 353 (5th Cir. 1968). Evaluation of the Act as a whole and its legislative history evinces an unmistakable congressional intent to marshall the requisite federal funds to achieve the water quality goals set forth in the Act. The Congress made an exhaustive study of the problem and on the basis of those findings decided, in Senator Muskie's words, that:

> To achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill, and the conferees are convinced that the level of investment authorized by this Act is the minimum dose of medicine that will solve the probems [sic] we face.

118 Cong. Rec. S16871 (Daily ed. Oct. 4, 1972).

Thus in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act, this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in § 207 of the Act in accordance with § 205(a). It is accordingly

ORDERED, ADJUDGED and DECREED that Defendant's motion to dismiss and for summary judgment are hereby DENIED, and that Plaintiffs' motions for summary judgment are GRANTED; it is further declared that Defendant's act in allotting $2 billion and

$3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Act and that Defendant is ordered to revise the allotments he has already made for fiscal years 1973 and 1974 to comply with § 205(a) and to make said allotments in the amount of $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

Entered this 2nd day of October, 1973, at Austin, Texas.

/s/ Jack Roberts
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Texas' motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiffs so that the State of Texas is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 25th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF OKLAHOMA	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Oklahoma's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Oklahoma is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "D"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF WISCONSIN	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN,	)(	
Administrator of the	)(	
Environmental Protection	)(	
Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motion to dismiss and for summary judgment are denied;

(2) Plaintiff State of Wisconsin's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Wisconsin is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "E"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF MISSOURI	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge presiding, and the issues being duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

(1) Defendant's motions to dismiss and for summary judgment are denied;

(2) Plaintiff State of Missouri's motion for summary judgment is granted;

(3) Defendant's act in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, was unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(4) Defendant is ordered to revise the allotments he has made to plaintiff so that the State of Missouri is allotted its pro rata share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.

Entered this 29th day of October, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK OF COURT

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "F"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, ET AL	)(	
	)(	
V.	)(	Civil Action No.
	)(	A-73-CA-38
RUSSELL E. TRAIN,	)(	
Administrator of the	)(	
Environmental Protection	)(	
Agency	)(	

JUDGMENT

This action came on for hearing before the Court, Honorable Jack Roberts, District Judge, presiding, and the issues being duly heard and a decision having been duly rendered.

It is ORDERED, ADJUDGED and DECREED that:

(1) Plaintiff State of Kansas' motion for summary judgment is GRANTED;

(2) Defendant's acts in allotting $2 billion and $3 billion for fiscal years 1973 and 1974, respectively, were unlawful under the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 86 Stat. 816; and

(3) Defendant is ordered to revise the allotments he has already made for fiscal years 1973 and 1974 to the State of Kansas so that it is alloted its pro rata

share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974 by the Act.

Entered this 6th day of December, 1973, at Austin, Texas.

DAN W. BENEDICT
CLERK

by /s/ Wanda V. Peterson
Wanda V. Peterson, Deputy Clerk

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-3965
No. 73-4026

STATE OF TEXAS, ET AL.,

Plaintiffs-Appellees,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant.

* * * * * * * * *

STATE OF TEXAS, ET AL.,

Plaintiffs-Appellees,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant.

Appeals from the United States District Court
Western District of Texas

Before BELL, GOLDBERG, and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to expedite judgment on the merits in this matter is DENIED. *See Train v. City of New York* (No. 73-1377) and *Train v. Campaign Clean Water* (No. 73-1378), *cert. granted* April 29, 1974.

IT IS FURTHER ORDERED that the motion to vacate the stay order of this Court dated January 28, 1974 is GRANTED effective June 5, 1974.

APPENDIX "H"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

May 28, 1974

TO ALL COUNSEL OF RECORD:

No. 73-3965 - State of Texas, et al, v.
No. 73-4026 - Russell E. Train, Administrator of the Environmental Protection Agency.

[Argued & Submitted 4-29-74 - N.O. West Courtroom]

Gentlemen:

I am directed by the Court to advise that the disposition of the referenced cases is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York,* (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Richard E. Windhorst, Jr.
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW,Jr.:rcv

Messrs. Robert E. Kopp &
Eloise E. Davies
Mr. Theodore L. Priebe
Mr. Paul C. Duncan
Mr. Philip Maxwell
Mr. Curt Schneider

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1895

STATE OF TEXAS, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

As petitioners recognize (Pet. 10), this petition, seeking certiorari before judgment in the court of appeals, presents "essentially the same" issues as *Train* v. *City of New York*, No. 73-1377, and *Train* v. *Campaign Clean Water, Inc.*, No. 73-1378, certiorari granted, April 29, 1974. The issue is whether under Section 207 of the Water Pollution Control Act Amendments of 1972, the Administrator of the Environmental Protection Agency has discretion to allot among the states amounts less than the total Congress has authorized to be appropriated under those amendments.

Petitioners are five states who have brought suit challenging the Administrator's action in allotting $2 billion for fiscal year 1973 and $3 billion for fiscal 1974; the statute authorizes appropriations for sewage treat-

ment plants for those two fiscal years of "not to exceed" $5 billion and $6 billion. The district court concluded that "the Administrator has a mandatory duty to allot * * * the sums authorized by Congress in Section 207 of the Act" (Pet. App., p. 24), granted summary judgment in favor of each of the petitioners, and ordered the Administrator to allot to each its *pro rata* share (Pet. App., pp. 27-36).

The Administrator appealed to the Court of Appeals for the Fifth Circuit, which heard oral argument on April 29, 1974, the date that this Court granted certiorari in *City of New York* and *Campaign Clean Water*. The court of appeals subsequently advised counsel for the parties that it would withhold its disposition of the appeal pending this Court's decision in those cases (Pet. App., pp. 39-40).[1]

Petitioners seek review prior to judgment in the court of appeals to enable this case to be heard with the *City of New York* and *Campaign Clean Water* cases. We submit, however, that all the issues that petitioners raise can be fully and adequately considered in those two cases, and that there is no occasion for this Court to bypass the normal appellate processes to hear the additional cases at this time. See Rule 20 of the Rules of this Court. Indeed, petitoners have already filed an *amicus* brief in those cases.

Petitioners contend certiorari before judgment should be granted because "the record in the instant case contains evidence on the impact of the Administrator's impoundment action on the States" which would be "of assistance to the Court in judging the important legal issues raised

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[1]On June 17, 1974, this Court stayed the district court's orders pending disposition of the appeal by the Fifth Circuit.

in this controversy" (Pet., p. 11). We disagree with their characterization of the record in this case. Three of the five petitioner states—Texas, Wisconsin and Missouri—filed affidavits in support of their motions for summary judgment which showed waste treatment construction "needs" and potential projects that exceeded their allotments. These affidavits did not show, however, that the proposed projects would meet the Administrator's criteria for grant approval, or that potential grantees were prepared to fund their share (25 percent) of such projects.

In any event, as shown in our brief in *City of New York* and *Campaign Clean Water*, the reduction in allotments has not significantly reduced the rate of obligation and subsequent expenditure under this program with respect to any states or territories covered by the Amendments. As of May 31, 1974, not all of the sums allotted in November 1972 had been obligated by any jurisdiction, and substantially all the $4 billion allotted by the Administrator in January 1974 remained available for obligation (Pet. Brief, Nos. 73-1377 and 73-1378,

pp. 6-7; and Appendix, Table I).[2] Accordingly, the factual record here would not aid the Court in resolving the legal issues raised in this controversy.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[2]Figures for the five petitioner states, as extracted from Table I, are as follows:

State/territory	Allotments	Obligations	Percent obligated
Kansas			
Fiscal year 1973	7,484,000	5,842,030	78
Fiscal year 1974	11,226,000	———	—
Fiscal year 1975	40,192,500	600,000	1
Missouri			
Fiscal year 1973	33,112,000	30,401,300	91
Fiscal year 1974	49,668,000	———	—
Fiscal year 1975	74,546,400	7,940,620	11
Oklahoma			
Fiscal year 1973	9,216,000	8,049,375	87
Fiscal year 1974	13,824,000	4,302,135	31
Fiscal year 1975	46,997,400	———	—
Texas			
Fiscal year 1973	55,388,000	55,347,224	99
Fiscal year 1974	83,082,000	4,734,761	5
Fiscal year 1975	106,900,250	———	—
Wisconsin			
Fiscal year 1973	34,830,000	6,790,650	19
Fiscal year 1974	52,245,000	57,375	—
Fiscal year 1975	52,360,400	———	—

DOJ-1974-09